93-796

Supreme Court, U.S.
FILED
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No. (1)

In the Supreme Court of the United States

October Term, 1993

Blaine A'mmon White, Petitioner

v.

United States of America

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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238 pp

QUESTION PRESENTED

Whether the collateral estoppel doctrine forecloses a subsequent criminal prosecution involving the same set of operative facts, emanating from the same transaction, where the defendant interposed the same single issue defense, whereupon the first jury returned a verdict of acquittal on one count but disagreed on the remaining count, and the second jury convicted defendant on the count previously unresolved.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Blaine A'mmon White, *pro se*, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App., infra, A) is reported at, 1 F.3d 13 (D.C.Cir. 1993).

The companion opinion of the United States Court of Appeals for the District of Columbia Circuit (App., infra, B) is reported at, 936 F.2d 1326 (D.C. Cir. 1991). The opinion of the United States District Court for the District of Columbia (App., infra, C) is reported at, 757 F.Supp. 45 (D.C.D.C. 1990). The judgement of the United States Court of Appeals for the District of Columbia Circuit, (App., infra, A), No. 92-3130, was entered July 27, 1993. Petitioner filed a timely petition for rehearing, (App., infra, H), and a petition for rehearing *en banc* (App., infra, I), on September 3, 1993. Both petitions were denied on October 1, 1993; (App., infra, E and F). Petitioner filed a Motion for Stay of Mandate on October 7, 1993; (App., infra, G), said Motion was granted October 22, 1993. (App., infra, F). This

petition for writ of certiorari was filed on November 19, 1993.

JURISDICTION

The jurisdiction of this Court rests on Title 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION, PROVIDES: "NOR SHALL ANY PERSON BE THE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB."

STATEMENT OF THE CASE

On March 20, 1990, a federal grand jury charged petitioner, and a co-defendant, Harold David Linden, in a two count indictment alleging the following: Count I, that petitioner and a co-defendant knowingly possessed a birth certificate in the name of William Smith

Baldwin with the intent that such document be used to defraud the United States in violation 18 U.S.C. §§ 1028 (a)(4) and; Count II, making false statements in an application for a passport for the use of Harold David Linden in violation of 18 U.S.C. § 1542.

The co-defendant entered a guilty plea as to both counts of the aforesaid indictment on June 28, 1990; prior to the start of petitioner's trial on the same day.

Petitioner was the only fact witness in his behalf. Petitioner's only defense to both counts was that he had always known Linden as Baldwin, and did not know Baldwin was dead. (App., infra, B-13 thru B-14, O-4, P-4 thru P-8, and Q-3). At the close of all of the evidence, petitioner moved for judgement of acquittal. During arguments before the district court in

opposition to petitioner's motion, government counsel acknowledged that the only issue for the jury to resolve was the knowledge/intent of petitioner at the time he committed the acts alleged. (App., infra, O-4). "[I]t's the government's position that the actual acts charged are not in dispute and the issue only [sic] is the intent of the defendant [petitioner] at the time he performed the acts."

Petitioner's motion was denied. During its summation, the government maintained once again that the "sole" issue was the knowledge/intent of defendant (petitioner). (App., infra, N-23). Furthermore, among the instructions given to the jury was a special jury instruction requested by petitioner which crystallized the knowledge issue in the context of the facts adduced at trial. (App., infra, J-2, J-4).

On July 3, 1990, the jury returned a verdict of acquittal with respect to Count I of the indictment. Nevertheless, the jury disagreed with respect to Count II. The district court granted a mistrial on even date. On July 25, 1990, the government moved, before the district court, for dismissal of Count II of the indictment without prejudice. (App., infra, B-9). The district court granted said motion. Defendant was re-indicted on October 9, 1990, along with a co-defendant Thomas G. Weyforth, and charged in a four count indictment as follows: conspiracy in violation of 18 U.S.C. § 371; making false statements in application for a United States passport for Harold David Linden, an alien, in the name of William Smith Baldwin, in violation of 18 U.S.C. § 1542; concealing, harboring, and concealing from detection Harold David

Linden, an alien who had come into, entered and remained in the United States in violation of the law, 18 U.S.C. § 1324 (a)(1)(c); and, aiding and abetting 18 U.S.C. § 2. Count IV of the second indictment was the same count upon which the jury was unable to agree in the initial prosecution of petitioner. (App., infra, B-10).

On November 16, 1990, petitioner filed a Motion to Dismiss the second indictment based on the grounds of Double Jeopardy and collateral estoppel pursuant to Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Petitioner argued that because there was but one single issue defense raised by petitioner with respect to both counts of the initial indictment that the said issue, i.e., knowledge, was the ultimate issue which the jury, in returning its verdict of

acquittal, had foreclosed from further prosecution. The district court, however, denied petitioner's motion on December 20, 1990. The opinion of the district court is reported at United States v. White, 757 F.Supp. 45 (D.C.D.C. 1990); (App., infra, C-2 thru C-31).

Upon the denial of petitioner's motion, petitioner filed an interlocutory appeal pursuant to Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). On June 28, 1991, the United States Court of Appeals for the District of Columbia Circuit denied petitioner's appeal, thus clearing the way for a second trial. The court of appeals in rejecting petitioner's Double Jeopardy contention, opined that the fact of the hung jury as to Count II of the first indictment against petitioner was a finding inconsistent with the verdict of acquittal

reached on Count I of the same indictment despite the fact of a common single issue defense. (App., infra, B-13 thru B-17).

The court of appeals decision allowed for the re-trial of petitioner as to Count II of the initial indictment (in its current form as Count IV of the second indictment) as well as the three newly alleged violations. Petitioner's second trial commenced on March 3, 1992. Prior to the trial, petitioner filed a Motion in Limine. The said motion sought to prohibit the government from introducing any evidence concerning the acquitted behavior of petitioner with respect to the Baldwin birth certificate. (App., infra, R). The district court denied petitioner's motion. Petitioner then requested a special jury instruction (App., infra, K-2) to limit the scope and effect of the birth certificate evidence

pursuant to Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). The rationale for petitioner's request were Double Jeopardy and collateral estoppel. This request was also denied. (App., infra, L-3 thru L-7).

The government re-introduced, in total, the evidence from petitioner's initial trial with respect to the document fraud count (Count I, of which petitioner was acquitted). All of petitioner's conduct, regarding acquisition and transfer of the fraudulent birth record, was also re-introduced. The objections of petitioner as to both the aforesaid were overruled by the district court. (App., infra, M-6 thru M-14, at M-10).

On March 5, 1992, the jury returned a verdict of acquittal as to two counts of the second indictment against petitioner.

With respect to Count IV (the unresolved count from the initial prosecution of petitioner), a finding of guilt was returned. In addition, petitioner was found guilty of aiding and abetting passport fraud. (App., infra, A-10).

Petitioner was sentenced on May 13, 1992 to a one year term of imprisonment, 200 hours community service, two years supervised probation, and ordered to pay a $100 special assessment.

On May 15, 1992, petitioner appealed the aforesaid convictions. Petitioner asked the United States Court of Appeals for the District of Columbia Circuit to overturn his convictions again based upon the doctrine of Double Jeopardy, and the rule of collateral estoppel; and requested that the court re-assess its earlier determination that collateral estoppel was

inapplicable. Additionally, petitioner also alleged a violation of his Double Jeopardy protection pursuant to Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2089, 109 L.Ed.2d 548 (1990). During the pendency of said appeal, this Court issued its opinion in United States v. Dixon, 509 U.S. ---, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), which overruled Grady, supra.

On July 27, 1993, the United States Court of Appeals for the District of Columbia Circuit affirmed petitioner's conviction, choosing not to revisit petitioner's collateral estoppel argument citing the law of the case, (App., infra, A-15), and rejecting petitioner's theory under Grady, supra, as the same had been overruled. (App., infra, A-14-15).

REASONS FOR GRANTING THE PETITION

1. The opinion of the United States Court of Appeals for the District of

Columbia Circuit rejecting petitioner's collateral estoppel argument is in conflict with the decisions of six of the eight federal circuits which have addressed the issue in the context of the case at bar. Only the District of Columbia Circuit and the First Circuit hold positions which are counter to that advanced by the petitioner and the federal circuit majority. In substance, the minority position holds that collateral estoppel is not applicable where there is a multi-count indictment arising from the same set of operative facts, involving the same transaction against which a single defense is interposed and there is a verdict of acquittal as to one count but the jury is hung with respect to the remaining count. The rationale of the minority hinges on their belief that application of the collateral estoppel

rule in the context of the case at bar would require an assumption that the jury acted inconsistently, reaching opposite findings on the same issue in different counts. (App., infra, B-17). The majority view is anchored in the belief that a hung jury decides nothing. Therefore, the jury's failure to reach a verdict is too inconclusive to qualify as inconsistent for the purposes of issue preclusion. The powerful Double Jeopardy protections that attach to acquitted counts should not be outweighed by the inconclusiveness inherent in hung counts. United States v. Bailin, 977 F.2d 270, 279-280 (7th Cir. 1992), citing, United States v. Seley, 957 F.2d 717, 723 (9th Cir. 1992).

2. The decision of this Court in Dixon, supra, has created confusion, which only this Court can resolve, as to the

amount of Double Jeopardy protection afforded criminal defendants facing successive prosecutions in the absence of Grady, supra, which, Dixon, supra, overruled; while nonetheless leaving undisturbed, Illinois v. Vitale, 447 U.S. 410, 100 S.Ct 2260, 65 L.Ed.2d 228 (1980); Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977); and In re Nielsen, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed 118 (1889). This line of precedents indicates that criminal defendants have additional Double Jeopardy protection with respect to use of prior acquitted conduct in a subsequent prosecution. However, since Dixon, supra, one does not know, with any degree of certainty, what that protection is. Therefore, further review is thus warranted.

ARGUMENT

I.

BY ITS VERDICT OF ACQUITTAL, THE JURY AT THE PETITIONER'S FIRST TRIAL DETERMINED THE ONLY CONTROVERTED ULTIMATE ISSUE OF FACT; I.E., KNOWLEDGE, IN FAVOR OF PETITIONER; A SUBSEQUENT PROSECUTION ARISING FROM THE SAME SET OF OPERATIVE FACTS INVOLVING THE SAME TRANSACTION IS PRECLUDED BY THE RULE OF COLLATERAL ESTOPPEL.

A comparison of the records from both of petitioner's trials makes it abundantly clear that, as to all charges, in both prosecutions, petitioner interposed the same single issue defense; i.e., lack of knowledge. With respect to the first prosecution, see (App., infra, B-13 and 14, N-22 thru N-25, O-4, P-4 thru P-8, and

Q-3); with respect to the second prosecution, see (App., infra, A-3 thru A-4, L-7 thru L-11, and M-5).

Regarding both prosecutions, the government admitted that the only issue was knowledge, and that all of the acts were intertwined. As to the first prosecution, see (App., infra, N-23-25, O-4, P-4 thru P-8). As to the second prosecution, see (App., infra, L-9 thru L-12 and M-5). Additionally, the jury in the first proceeding was instructed in a specific fashion as to the issue of knowledge in the context of the facts adduced at trial. (App., infra, J-2, J-4). Thus, unlike other cases involving the application of the collateral estoppel rule, one has no difficulty in identifying the ultimate issue of fact in the case at bar.

It is against the aforegoing backdrop

that the jury in the initial prosecution returned a verdict of acquittal with respect to Count I of the indictment, (document fraud), but was hung with respect to the passport fraud count. Because there was a single issue defense, and knowledge or the lack thereof was the ultimate issue to be decided, petitioner contends that the issue of knowledge was decided in favor of petitioner at the initial proceeding by virtue of the acquittal.

Ashe, supra, instructs that when an issue of ultimate fact has once been determined by a valid and final judgement, that issue can not again be litigated in any future lawsuit. Id., at 397 U.S. 442, 90 S.Ct. 1194. Furthermore, Ashe, Id., holds that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic

approach of a nineteenth century pleading book, but with realism and rationality. Where a previous judgement of acquittal was based upon a general verdict, (as the case at bar), this approach requires a court to "examine the record of the prior proceeding taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than which the defendant (petitioner) seeks to foreclose from consideration." Ashe, Id.

In light of the fact that there was a single issue defense as to all counts in the initial proceeding, which same defense was carried over into the second prosecution, the government's concession that knowledge was the only issue (App, infra, O-4), the government's summation (App., infra, N-23), and the special jury

instruction requested by petitioner (App., infra, J-2, J-4), a rational approach to the application of the collateral estoppel rule requires a finding that the ultimate issue of knowledge was resolved in petitioner's favor in the initial prosecution. Thus, the ultimate issue of knowledge is foreclosed from further consideration in any future proceeding between the same parties, as in the case at bar. See, Ashe, supra.

The United States Court of Appeals for the District of Columbia mistakenly opined that a hung jury is tantamount to a "finding". (App., infra, B-17). With all due respect, the flawed view of the District of Columbia Circuit is in opposition to the majority view which holds that a hung jury, by definition, is one which reaches no finding whatsoever. See, United States v. Brown, 983 F.2d 201

(11th Cir. 1993); United States v. Bailin, 977 F.2d 270 (7th Cir. 1992); United States v. Rogers, 960 F.2d 1501 (10th Cir. 1992); United States v. Seley, 957 F.2d 717 (9th Cir. 1992); Pettaway v. Plummer, 943 F.2d 1041 (9th Cir. 1991); United States v. Frazier, 880 F.2d 878 (6th Cir. 1989); United States v. Griggs, 651 F.2d 396 (5th Cir. 1981); United States v. Larkin, 605 F.2d 1360 (5th Cir. 1979). The court's language in Bailin, Id., at 279, is most instructive of the majority view. "The government cannot prevail with the ... argument that an acquittal on one count, coupled with a hung jury on a related count makes it impossible to determine that a jury necessarily established any common element of those two offenses. 'A hung jury is defined as a jury so irrevocably divided in opinion that it cannot agree upon any verdict by

the required unanimity,' Black's Law Dictionary 741 (6th ed. 1990), or as 'one that did not carry out the task assigned it.' Anne B. Polin, Collateral Estoppel in Criminal Cases, 58 Cinn. L. Rev. 1, 44 n. 12 (1989). Therefore, the 'jury's failure to reach a verdict [is] too inclusive to justify as inconsistent for the purposes of issue preclusion.' Id., The powerful Double Jeopardy protections that attach to acquitted counts should not be outweighed by the inconclusiveness inherent in hung counts." Id., at 280; citing, United States v. Seley, supra. Therefore, a conflict between the circuits exists as to what effect the fact of a hung jury has upon the application of the collateral estoppel rule under Ashe, supra. This Court is the only tribunal which can settle this dispute.

Furthermore, among the state courts

of last resort which have addressed Double Jeopardy and collateral estoppel in the context of the case at bar, majority and minority views also prevail. Ferrell v. State, 318 Md. 235, 567 A.2d 937 (1990) is representative of the majority view explained above. See Ferrell, supra, at 947. The minority position is represented by the holding in State v. Esposito, 148 N.J.Super. 102, 371 A.2d 1273 (1977). Therefore, by accepting the case at bar, the Court would achieve the dual purpose of also resolving the conflicting views of state appellate courts. Therefore, there would be uniformity among both the federal circuits and state tribunals. Thus, petitioner respectfully requests that this Court issue a writ of certiorari.

II.

IN THE ABSENCE OF GRADY V. CORBIN, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) CONFUSION EXISTS AS TO THE AMOUNT OF DOUBLE JEOPARDY PROTECTION AFFORDED CRIMINAL DEFENDANTS WHEN FACED WITH SUCCESSIVE PROSECUTIONS INVOLVING CONDUCT FOR WHICH THERE HAS BEEN A PREVIOUS ACQUITTAL.

Mr. Justice Souter, dissenting in Dixon, supra, at 113 S.Ct. 2891, remarked that "[o]verruling Grady alone cannot remove this principle (that the Double Jeopardy clause bars successive prosecutions for more than one statutory offense where the charges comprise the same act) from our Constitutional jurisprudence. Only by uprooting the entire sequence of cases, Grady, Vitale, Harris, and Nielsen, could this Constitutional principle be undone." In

light of the fact that this Court has let stand Vitale, Harris, Brown, and Nielsen, it is apparent that the Court did not intend, by overruling Grady, to completely disengage criminal defendants in subsequent prosecutions from the protection of having to re-litigate prior acquitted conduct. Furthermore, the case at bar is distinguishable from Dixon, supra. Dixon, Id., involved a contempt proceeding; the case at bar involved substantive offenses. Petitioner contends therefore, that different rules apply when determing whether to allow prior acquitted behavior to be the foundation of a future prosecution. Nevertheless, since Dixon, supra, is silent as to what Double Jeopardy rights remain with respect to prior acquitted conduct, and re-litigation of issues surrounding that conduct, the District of Columbia Circuit has simply

decided to opine that there is no protection whatsoever against re-litigation of prior acquitted conduct (App., infra, A-14 and 15). In the absence of clarification from this Court the other circuits will, no doubt, follow the path unconstitutionally skewed against the once acquitted criminal defendant. In light of the apparent incongruity between the circuit court's rationale and the precedent left intact by Vitale, Harris, Brown, and Nielsen, this Court is asked to make a specific pronouncement as to what protection, if any, is afforded a criminal defendant with respect to having to re-litigate prior acquitted conduct.

In the matter at hand, petitioner requested a special jury instruction to limit the scope and effect of his prior acquitted conduct (App., infra, K-2). Petitioner's request was denied (App.,

infra, L-3, thru L-6), in spite of the fact that the requested instruction was lifted almost verbatim from Dowling, supra. The circuit court made no pronouncement in its opinion (App., infra, A-2 thru A-17), as to the efficacy of petitioner's request; unless, *sub silentio*, the court rejected petitioner's claim (App., infra, H). Petitioner made the circuit court aware of the omission (App., infra, H & I). Nonethless, the circuit court refused to address the jury instruction issue. Thus, a further review by this Court is required to protect petitioner's constutional rights.

The Double Jeopardy clause prevents the government from making repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal, and compelling him to live in a continuing

state of anxiety and insecurity. The clause addresses a further concern as well, that the government not be given the opportunity to rehearse its prosecution, honing its trial strategy, and perfecting its evidence through successive attempts at conviction, because this enhances the possibility that even though innocent, the defendant may be found guilty. See, Dixon, supra, at 113 S.Ct. 2883, Mr. Justice Souter with Mr. Justice Stevens concurring in the dissent, citing, Green v. United States, 335 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957). Petitioner was subjected to the type of harm which the Double Jeopardy clause was enacted to protect. Petitioner's contention is bolstered by a review of the government's second trial rationale in opposing the petitioner's limiting jury instruction (App., infra, K-2). The

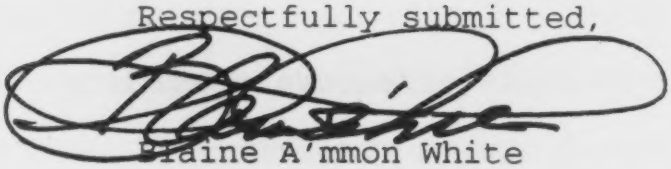
government's position was that it was "perfectly permissible" for the jury to infer guilt from the act of acquiring the Baldwin birth certificate. (App., infra, L-4). Furthermore, in the second trial summation, the government argued that the petitioner's knowledge of Linden's aliases was apparent from the application for the birth certificate (App., infra, L-10 thru L-11, and L-14 thru L-14). The aforegoing are all acts for which petitioner had been acquitted in the initial prosecution. Thus, petitioner's Double Jeopardy rights were violated.

Therefore, in the name of fundamental fairness, a further review of petitioner's conviction is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Pro Se

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APPENDIX
